IN THE

Supreme Court of the United States

No. 399

October Term, 1950.

JACK H. BREARD,

Appellant,

v.

CITY OF ALEXANDRIA,

Appellee.

APPELLANT'S BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS APPEAL.

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I.

PRELIMINARY STATEMENT.

On September 25, 1950, Chief Justice Fournet of the Supreme Court of Louisiana allowed appellant's petition for an appeal to the United States Supreme Court from a judgment entered by the Supreme Court of Louisiana on June 30, 1950.

On October 3, 1950, the City of Alexandria, the appellee here, by its city attorney served upon appellant's attorney a motion to dismiss the appeal on the sole ground that the appellant had not exhausted all his remedies in the Supreme Court of Louisiana—the highest court of the state—because of his failure to apply to that court for a rehearing.

Appellee's motion to dismiss was filed with the Clerk of the Supreme Court of Louisiana pursuant to Rule 12 (3) of the United States Supreme Court. At the time the motion was filed, the appeal had not as yet been docketed with the Clerk of the United States Supreme Court. This brief opposing the motion to dismiss is filed by appellant pursuant to Rule 7 (3) of the United States Supreme Court.

II.

ARGUMENT.

Article 911 of the Code of Practice of Louisiana (Dart, Louisiana Code of Practice, page 1021) provides as follows:

> "Judgment rendered in the Supreme Court of the State shall become final and executory on the fifteenth calendar day after rendition, in term time and out of term time, unless the last day shall fall on a legal holiday when the delay shall be extended to the first day thereafter not a legal holiday; provided, that in the interval parties in interest shall have the right to apply for rehearing * * *".

Apparently, it is the position of the appellee that it was mandatory upon the appellant to apply for a rehearing before making application for an appeal to the Supreme Court of the United States.

Appellant submits that there is no merit whatsoever to appellee's position.

There is no requirement in the applicable federal statutes or the Rules of the Supreme Court of the United States that requires an appellant to file a petition for rehearing after the rendition of a judgment by the highest court of a state before taking an appeal to the United States Supreme Court.

The jurisdiction of the United States Supreme Court to review decisions of state courts by appeal is based upon 28 U. S. C. Section 1257, which, in so far as it is applicable here, reads as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity."

Appellant has indicated in his "Statement as to Jurisdiction" that the above jurisdictional prerequisites are present in this case. Appellee by its motion to dismiss has not contested any of the above jurisdictional matters except possibly that of the "finality" of the judgment.

It is well settled that the ultimate test of finality of the judgment of a state court for the purpose of review is formulated by the United States Supreme Court and not by the law of the state where the judgment is rendered. In determining what is a final judgment or decree for purposes of review, the United States Supreme Court is not controlled by the designation applied to the judgment or decree in state practice. **Department of Banking of Nebraska v. Pink**, 317 U. S. 264, 268 (1942); **Cole v. Violette**, 319 U. S. 581, 582 (1943). The test is whether the judgment represents "an effective determination of the litigation" and is "subject to no further review or correction in any other state tribunal". **Market Street Railway Co. v. Railroad Commission of California**, 324 U. S. 548, 551 (1945).

The same principles apply where the state law (like the Louisiana statute) prescribes that the judgment of the highest state court shall become "final" within a specified number of days after rendition unless a petition for rehearing is filed within that time. The mere existence of such state procedure permitting the filing of a petition for rehearing does not affect the finalty of the judgment and does not prevent the United States Supreme Court from asserting immediate jurisdiction over the case. In other words, the appellant is not required to file a petition for rehearing but

may take his appeal before the expiration of the statutory period prescribed by the state practice. **Southern Railway Company v. Clift**, 260 U. S. 316, 319 (1922); **Department of Banking of Nebraska v. Pink**, 317 U. S. 264, 266 (1942). However, a timely petition for rehearing tolls the running of the appeal period because it operates to suspend the finality of the state court's judgment. Even then, if the petition for rehearing is disposed of before the expiration of the statutory period, the finalty attaches as of the date of the disposition of the petition rather than the last day of the period. **Market Street Railway Co. v. Railroad Commission of California**, 324 U. S. 548, 552 (1945).

The foregoing principles are well summarized in **Market Street Railway Co. v. Railroad Commision of California**, 324 U. S. 548 (1945). In that case the decision of the highest state court was rendered July 1, 1944 and a petition for rehearing was denied on July 27, 1944. An appeal was applied for and allowed on July 31, 1944. If the judgment became final for review purposes on denial of the rehearing, the appeal was timely; otherwise it was premature under a local rule that a decision by the California Court does not become "final" until thirty days after filing and that remittitur could not issue until the end of that period. In holding that the appeal was timely, Mr. Justice Jackson stated as follows beginning at page 551:

> "Our jurisdiction to review a state court judgment is confined by long-standing statute to one which is final. Judicial Code, § 237, 28 U. S. C. § 344. Final it must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.
>
> "We have held that finality of a judgment of a state court for determining the time within which our

jurisdiction to review may be invoked is not controlled by the designation applied in state practice. *Department of Banking v. Pink*, 317 U. S. 264; *Cole v. Violette*, 319 U. S. 581. The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment. The waiting period prescribed by the statute here seems to reserve a power of that character. * * * The rule is thus a limitation on the time during which the court may reconsider, which in absence of such rule might expire only with the end of the term or some other event determinative under local law. Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek our review begins to run. A timely petition for rehearing defers finality for our purposes until it is acted upon or until power to act upon it has expired as here it would appear to do at the end of the 30-day period. If rehearing is granted, the judgment is opened, and does not become final as a prerequisite to application for review by us until decision is rendered upon rehearing."

Under the well established principles set forth above, the judgment of the Supreme Court of Louisiana rendered upon June 30, 1950 had appealable finality beginning from that date. The judgment represented "an effective determination of the litigation" and was "subject to no further review or correction in any other state tribunal." Accordingly, the time to seek review by the United States Supreme Court began to run upon the rendition of the judgment. This was true despite the fact that under the local practice the judgment was not deemed final and executory until fifteen calendar days after rendition. Since the judgment had appealable finality immediately upon rendition, it follows

that appellant was under no compulsion to file a petition for rehearing before taking his appeal to the United States Supreme Court. Instead, the appellant was at liberty to apply for the allowance of his appeal immediately after the rendition of the judgment or at any other time during the ninety day period. Since this is true under the federal statutes and decisions of the United States Supreme Court, it follows that the appellee's contention is entirely without merit.

Accordingly, appellee's motion to dismiss the appeal should not be granted.

Respectfully submitted,

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